

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

**RULING: Government and Defense
Motions for Judicial Notice of
Adjudicative Facts**

30 August 2012

The Government moves this Court to take Judicial notice of the following adjudicative facts: (1) Army Regulation (AR) 25-2, paragraphs 1-4, 1-5, 3-3, 4-5, 4-16, 4-17, and figure B-1; (2) AR 380-5, paragraphs 1-20, 1-21, 1-22, Chapter 2; Chapter 4 (Section I); Chapter 5 (Sections I and V); paragraphs 6-1, 6-2, 6-3, 7-4, 8-3, and 8-12; (3) AR 530-1, paragraphs 1-5, 1-6, 1-7, and 2-1; (4) 18 U.S.C. Section 641; 18 U.S.C. Section 793(e); 18 U.S.C. Section 1030(a)(1); (7) Executive Order 13526; and (8) Authorization for the Use of Military Force.

The Defense objects to the Court taking judicial notice of (8) Authorization for the Use of Military Force on the grounds that it is not relevant under MRE 401. Defense does not object to the Government motion for the Court to take judicial notice of the regulatory paragraphs in (1) – (7) above. The Government motion to take Judicial notice of adjudicative facts in (1) – (7) is **GRANTED**.

The Defense moves this Court to take Judicial Notice of the following adjudicative facts:

Excerpts From David Finkel's Book The Good Soldiers;

1. The Defense requests the Court to take judicial notice that David Finkel's book, The Good Soldiers, was published prior to the alleged leaks in this case and to take judicial notice that Mr. Finkel's book contains audio from the video charged in Specification 2 of Charge II.
2. The Government does not object to the Court taking judicial notice that David Finkel's book was published prior to the leak of the video in Specification 2 of Charge II. The Government objects to the Court taking judicial notice that David Frankel's book contains a verbatim transcript of the video charged in Specification 1 of Charge II.

Inadequacies with the Distributed Common Ground System-Army (DCGS-A);

1. The Defense moves the Court to take judicial notice of inadequacies with the Distributed Common Ground System-Army (DCGS-A), specifically that the system was prone to crashes and incapable of functioning when not connected to a network.
2. The Government opposes on the ground that the information supplied by the Defense does not support the proposition that inadequacies and issues with the DCGS-A were well known or even generally known within the military community.

The Law:

1. Military Rule of Evidence (MRE) 201 governs judicial notice of adjudicative facts. The judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *U.S. v. Needham*, 23 M.J. 383 (C.M.A. 1987); *U.S. v. Brown*, 33 M.J. 706 (A.C.M.R. 1991).
2. MRE 201(c) requires the military judge to take judicial notice of adjudicative facts if requested by a party and supplied with the necessary information.
3. When the military judge takes judicial notice of adjudicative facts, the fact finder is instructed that they may, but are not required to, accept as conclusive any matter judicially noticed.
4. Judicial notice is of adjudicative facts. Judicial notice is not appropriate for inferences a party hopes the fact finder will draw from the fact(s) judicially noticed. Legal arguments and conclusions are not adjudicative facts subject to judicial notice. *U.S. v. Anderson*, 22 M.J. 885 (A.F.C.M.R. 1985) (appropriate to take judicial notice of the existence of a treatment program at a confinement facility but not appropriate to take judicial notice of the quality of the program.).

Findings of Fact and Conclusions of Law: Government Request for Judicial Notice (8):

1. The Joint Resolution Authorizing the Use of Force (JRAUF), 107th Congress Public Law 40 is an adjudicative fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The Government has provided the Court with the necessary information under RE 201(c).
2. The Court finds the JRAUF is relevant evidence for the Government to prove who is an “enemy” for the purposes of the specification of Charge I, and Specification 1 of Charge II. The fact that the JRAUF, standing alone, does not prove who is an enemy does not detract from its relevance.
3. The Government motion for Judicial Notice as Adjudicative Fact for (8) is **GRANTED**.

Conclusions of Law: Defense Request for Judicial Notice of Excerpts from David Finkel’s Book “The Good Soldiers”.

1. As the Government does not object, the Defense motion for the Court to take judicial notice that David Finkel’s book was published prior to the alleged leaks in this case is **GRANTED**.
2. The Defense provided the Court with a Washington Post article dated 6 April 2010 by David Finkel describing an excerpt from his book, The Good Soldiers. Defense did not provide the Court with the video charged in Specification 2 of Charge II to compare with the book or the article to determine whether the excerpt of the book is a verbatim transcript of the video.

3. The Defense motion for the Court to take judicial notice that Mr. Finkel's book contains a verbatim description of the audio from the video charged in Specification 2 of Charge II is **DENIED**.

4. The Court will take judicial notice of Mr. Finkel's book and relevant excerpts from pages of that book should the Defense provide the Court with the necessary information.

5. Linkages, argument, and legal conclusions regarding the contents of Mr. Finkel's book and the audio in the video are properly presented to the fact finder by the parties not by the Court.

Conclusions of Law: Defense Request for Judicial Notice of Inadequacies with the Distributed Common Ground System-Army (DCGS-A).

1. The Defense moves for the Court to take judicial notice of inadequacies with the DCGS-A, particularly that the DCGS-A system was prone to crashes and incapable of functioning when not connected to a network. The evidence provided to the Court in support of judicial notice does not demonstrate that these facts are generally known universally, locally, or in the area pertinent to the event or that these facts are capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned. The facts are not judicially noticeable.

2. During oral argument, the Defense advised the Court that, in the alternative, the Defense would request the Court to take judicial notice of the enclosures supporting the request for judicial notice, particularly attachments:

- A. July 2011 information paper by HQDA DCS, G-2 Initiatives Group (DIG);
- B. Commander's Handbook Distributed Common Ground System – Army (DCG-A), March 30, 2009;
- C. Advanced Ace, Analytical Capability Joint Urgent Operational Need Statement, MG Michael T. Flynn, Deputy Chief of Staff, Intelligence, 2 July 2010.
- D. 19 July 2010 letter from 3 members of Congress to the Chairman and Ranking Members of the House Appropriations Committee;
- E. 28 July 2010 letter to the Chairman, House Appropriations Committee from COL Peter A. Newell, Director, Rapid Equipping Force;
- F. 25 August 2010 letter to COL Newell from Congress members Gabrielle Giffords and Adam Smith;
- G. 23 May 2011 from Adam Smith, Congress member to General Martin E. Dempsey;
- H. 29 June 2011 article from Politico entitled "Computer bugs hurt Army ops;"
- I. 22 September 2011 Article from unknown newspaper entitled "U.S. Army intel software crashes during exercise".

3. The Court will take judicial notice of Attachments A –G. The Court will not take judicial notice of attachments H and I. Both articles rely on anonymous sources and the publisher of the Attachment I article is unknown. Neither article demonstrates that these facts are generally known universally, locally, or in the area pertinent to the event or that these facts are capable of

accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned.

4. Any linkages, argument, and legal conclusions regarding the contents of the judicially noticed documents are properly presented to the fact finder by the parties not by the Court.

RULING: The Government motion for judicial notice of Enclosures 1-8 is **GRANTED**. The Defense motion for judicial notice that David Finkel's book was published prior to the alleged leaks in this case is **GRANTED**. The Defense motion for judicial notice that Mr. Finkel's book contains a verbatim description of the audio from the video charged in Specification 2 of Charge II is **DENIED**. The Court will take judicial notice of Mr. Finkel's book and relevant excerpts from pages of that book should the Defense provide the Court with the necessary information. The Defense motion for judicial notice of inadequacies with the DCGS-A, particularly, that the DCGS-A system was prone to crashes and incapable of functioning when not connected to a network is **DENIED**. The alternative motion by the Defense for judicial notice of attachments A – I is **GRANTED IN PART**. The Court will judicially notice attachments A – G.

So **Ordered** this 30th day of August 2012.



DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit